STRAITS SETTLEMENTS REPORTS.

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JOHN KERSHAW TATTERSALL PICKUP

vs.

BERTHA FLORENCE PICKUP OTHERWISE GODFREY.

[Original Divorce Juris. (McElwaine, C.J.) Nov. 14, 1941]

Divorce Ordinance (Cap. 84) — Indian and Colonial Divorce Jurisdiction Acts.

The Courts of the Colony have no power to give a decree of nullity of marriage based on impotence unless the parties are domiciled in the Colony, or unless the case can be brought under the Indian and Colonial Divorce Jurisdiction Acts 1926—1940.

Cases referred to:—

(1) *Inverclyde v. Inverclyde* 1931 P. 29.

(2) *White v. White* 1937 P. 111.

(3) *Hussein v. Hussein* 1938 P. 159.

(4) *Ross v. Rees* Withers Payne's Digest Case No. 267.

SUMMONS.

J. T. Haydon for applicant.

Cur. adv. vult.

McElwaine, C.J.—This is a summons in which the petitioner asks leave to file and issue a petition. He also asks for an order for substituted service.

The petitioner is seeking a decree of nullity of the marriage between himself and the respondent on the ground of the respondent's impotence and also on the ground of his wife's refusal to consummate the marriage.

The marriage was celebrated in Singapore. The parties are alleged in the petition to have resided from the date of the marriage until December 1940 in Java, in which part of the Netherlands East Indies the petitioner was residing at the time he signed and swore to the truth of the petition.

The petition states that the domicile of the petitioner and of the respondent is in England. It is clear, and indeed is freely conceded, that this case cannot be brought under the Indian and Colonial Divorce Jurisdiction Acts, 1926–1940.

Mr. Haydon relied on the local Divorce Ordinance Cap. 84 S. 4 sub-s. 2 which so far as material reads: "Nothing herein shall authorise the Court to make any decree of nullity of marriage — except (b) where the marriage to which the decree relates was celebrated in the Colony." This is a restriction on the powers of the Court and limits the general power conferred by s. 3 which enacts:

> Subject to the provisions contained in this Ordinance, the Court shall in all suits and proceedings hereunder act and give relief on principles which in the opinion of the Court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings.

This section appears to me to apply English law, and it is a fundamental principle that an English Court cannot grant a decree of nullity based on impotence unless the parties are domiciled in England; *Inverclyde v. Inverclyde*[1]. *Mr. Braddell* in 1 Laws of the Straits Settlements p. 60, and *Van Someren* in his notes to the Divorce Ordinance, make no reference to domicil as an essential to jurisdiction in nullity, but neither of these works refers to *Inverclyde v. Inverclyde* which was decided long after *Van Someren's* work and, I fancy, while the last edition of *Mr. Braddell's* work was in the press.

I am aware that s. 4 sub-s. 1 of the Divorce Ordinance mentions domicil in connection with dissolution, and that s. 4 (2) does not mention domicil, but as Bateson J. points out at p. 41 of the report of the *Inverclyde* case: "Nullity on the ground of impotence is a suit to avoid a marriage and is in essence a suit to dissolve it." I think the same remark applies to nullity on the ground of refusal to consummate.

I am not considering nullity based on the so called marriage being illegal and void, as distinct from voidable. In such a case it is possible that domicil is not essential to jurisdiction, *White v. White*,[2], *Hussein v. Hussein*,[3] and the local case of *Ross v. Rees*[4] noted as case 267 in *Dr. Withers Payne's* Digest, the report of which is not available to me.

I think it much safer to follow the English law rather than to usurp a jurisdiction which the Divorce Ordinance does not expressly confer, a jurisdiction to try a case determining status irrespective of domicil.

In my opinion this Court has no power to give a decree of nullity based on impotence unless the parties are domiciled in the Colony, or unless the case can be brought under the Indian and Colonial Divorce Jurisdiction Acts, 1926–1940. As neither of these conditions is fulfilled I must hold this Court has

no jurisdiction. Even if residence alone conferred jurisdiction which, in view of the *Inverclyde* case it does not, the parties to this suit are not and never were resident here.

For these reasons I think that leave to file the petition and to serve it in any way would be a vain thing and must be refused.

Should the petitioner wish to appeal I am prepared to give a certificate.

If there is an appeal notice should be given to the Attorney General.

Order accordingly.

GHOUSE BIN HAJI KADER MUSTAN vs. REX.

[App. Crim. Juris. (McElwaine, C.J.) November 3, 1941]

Penal Code, Section 363 — Kidnapping from lawful guardianship — Position of Mohammedan girl who has attained puberty — Evidence Ordinance Ss. 121 (2), 123 — Whether wife of accused can be compelled to give evidence against him — Mohammedan Law.

The appellant in this case appealed against his conviction on a charge of kidnapping a Mohammedan girl under the age of 16 years from the lawful guardianship of her father. On appeal it was argued (inter alia) (1) that the only material witness as to the kidnapping was the girl herself and as the appellant had married the girl, she could not be compelled to give evidence against him, (2) that as the girl had attained puberty she was discharged from guardianship and therefore she had no guardian from whose keeping she could be kidnapped.

Held, (1) that the District Judge who convicted the appellant was fully within his rights in compelling the wife to give evidence, as her evidence did not fall under any section of the Evidence Ordinance which enacts that she shall not be compelled to give such evidence,

(2) that as the girl had attained puberty, she had no guardian and therefore she was not taken out of the keeping of the lawful guardian and that on this ground the appeal should be allowed.

Cases referred to:—

(1) *R. v. Leach* 1912 A.C. 305.

(2) *R. v. Wakefield* 2 Lewin 279.

(3) *Yeo Hock Cheng v. R.* 7 M.L.J. 104.

(4) *Swami v. King Emperor* 8 M.L.J. 59.

(5) *R. v. Amkeyo* 7 East African Law Report 14.

(6) *Robin v. R.* 12 East African Law Report 134.

(7) *Hyde v. Hyde* 1 P. & D. 130.

(8) *Salmah & another v. Soolong* 1 Kyshe 421.

(9) *Noordin v. Sheik Mohamed Meah Noordin Shah* 10 S.S.L.R. 72.

(10) *Mohamed Ibrahim v. Gulam Ahmad* (1864) 1 Bombay H.C.R. 236.

(11) *Choa Choon Neoh v. Spottiswoode* 1 Kyshe 216.

(12) *Miran Baksh* (1905) 2 Cr. L. J. 190.

(13) *Ex parte Tan Swee Eng* 10 M.L.J. 191.

(14) *Jamaludin v. Hajee Abdullah* 1 Kyshe 503.

D. Marshall for the appellant.

C. H. Butterfield for the Crown.

McElwaine, C.J.—The appellant appeals against his conviction on a charge:—

That he, on or about the 25th July 1941 at Singapore, kidnapped one Isah binte Shaik Buramdeen, a female then under the age of 16 years from lawful guardianship of one Shaik Buramdeen, her father, and had thereby committed an offence punishable under section 363 of the Penal Code.

There were four main grounds of appeal:—

1st That on the evidence the District Judge ought not to have convicted.

2nd That the only material witness as to the kidnapping was the girl Isah herself and as the appellant married this girl on 26th July and as she is still his wife she could not be compelled to give evidence against him, and the District Judge did compel her.

3rd That Isah having attained puberty was discharged from guardianship and therefore she had no guardian from whose keeping she could be kidnapped.

4th That it was established that the girl who was a Mohammedan of the Hanafi Sect, had attained puberty before the 25th day of July 1941. She was not a minor according to Mohammedan law and that the offence of kidnapping from lawful guardianship can only be committed in respect of a minor or of a person of unsound mind.

On the first point it is sufficient to say that the evidence was sufficient to support the conviction unless the point raised in any one of the three remaining grounds of appeal is determined in favour of the appellant.

The second ground is based on section 121 (2) of the Evidence Ordinance "In criminal proceedings against any person the husband or wife of such person respectively shall be a competent witness."

Mr. Marshall, who argued this case very well, laid great stress on the fact that the subsection does